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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

LINDA P. SMITH,

Plaintiff

Case No. 1:21-cv-00047-HCN-DBP

v.

XAVIER BECERRA, in his capacity
as the Secretary of the United States
Department of Health and Human
Services,

Defendant

PISTORINO DECLARATION IN
SUPPORT OF MOTION FOR
ATTORNEY'S FEES

JURY TRIAL DEMANDED

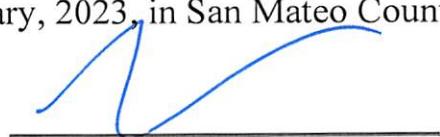
Judge Howard Nielson, Jr.
Magistrate Judge Dustin B. Pead

DECLARATION OF JAMES PISTORINO

I, James Pistorino, make this statement of my own personal knowledge and, if called upon to do so, I could competently testify to the matters herein:

1. I am a partner in the Parrish Law Firm, a graduate of Duke University School of Law, and have been a practicing lawyer involved in litigation for more than 25 years.
2. Attached, as Exhibit A, is a true and correct copy of the transcript of the oral argument held before the Tenth Circuit on May 17, 2022.
3. Attached, as Exhibit B are true and correct copies of the resumes/CVs of all the attorneys relevant to this fee petition.
4. Attached, as Exhibit C are true and correct copies of the relevant billing statements, including both expenses and the attorneys time charged at their usual and customary rates in their respective markets.
5. Attached, as Exhibit D, is a timeline of proceedings in this and related litigation.

Executed this 17th day of January, 2023, in San Mateo County, California.



Mr. James Pistorino

EXHIBIT A

ORAL ARGUMENTS

1

18 TRANSCRIPT OF RECORDED ORAL ARGUMENTS

21 THE PANEL: CHIEF JUSTICE TIMOTHY TYMKOVICH
22 JUDGE ALLISON EID
23 JUDGE JOEL CARSON

1 TRANSCRIPT OF ORAL ARGUMENTS, taken in the
2 above-entitled action, from an audio recording of
3 proceedings held on Tuesday, May 17, 2022.

APPEARANCES

JAMES C. PISTORINO,
Attorney at Law,
appearing on behalf of the
plaintiff-appellant;

JOSHUA KOPPEL,
Attorney at Law,
appearing on behalf of the
defendant-appellee.

THE CHIEF JUSTICE: I'll call our last case, 22-4012, Smith vs. Becerra. And Mr. Pistorino.

MR. PISTORINO: Thank you, Your Honor. James Pistorino on behalf of Mrs. Smith. Nearly five years after submitting — after presenting her claim for Medicare coverage, Ms. Smith finally reached the district court, the first tribunal in the appeal process with the power to review and invalidate 1682-R. The district court erred as a matter of law when it allowed the Secretary to avoid any judicial review when it concluded that the Secretary's agreement to pay her claims afforded Ms. Smith complete relief and left the court with no power to address the rest of Ms. Smith's causes of action, including her request for injunctive relief against 1682-R.

The district court's two-sentence docket entry entering judgment remanding solely for payment of Ms. Smith's claims but failing to make any findings or even consider the nonmonetary relief sought ignores that Ms. Smith's other causes of action were not alternative theories for monetary recovery.

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1 TRANSCRIPT OF ORAL ARGUMENTS, taken in the
2 above-entitled action, from an audio recording of
3 proceedings held on Tuesday, May 17, 2022.

Instead they sought separate nonmonetary relief, including an injunction.

JUDGE CARSON: Do you interpret the May 13th revised ruling as basically granting you a successful outcome on all your other pending claims?

MR. PISTORINO: When you say the May 13th revised ruling, you mean — are you referring to the document that was submitted on Friday at 4:15?

JUDGE CARSON: Yes.

MR. PISTORINO: So the first answer is no. I mean, honestly, again Ms. Smith sought —

JUDGE CARSON: You don't interpret that as giving you a win across the board —

MR. PISTORINO: No.

JUDGE CARSON: — on pending claims?

Why not?

MR. PISTORINO: Aga

there's no injunction against the enforcement of 1682, number one. There's no determination that the Secretary's process of issuing rulings without complying with notice and comment is in violation of the law. Throughout this entire case and throughout the entire really five-year

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1 period this matter has been litigated, the
 2 Secretary contends that they have the power to
 3 issue rulings in violation of 1395h, the notice
 4 and comment provision specific to the Medicare
 5 Act, and as the Secretary said below here and
 6 somewhat in the papers to this Court, the
 7 Secretary contends the district courts have no
 8 power to stop the agency from enacting illegally
 9 in that way.

10 JUDGE CARSON: So you're not going to
 11 declare victory?

12 MR. PISTORINO: No. No, I wish —
 13 frankly, I wish I could.

14 JUDGE CARSON: Honestly, we need to
 15 determine whether this is still justiciable
 16 under the mootness doctrine. What's your kind
 17 of best response that it's not moot?

18 MR. PISTORINO: Right. So again
 19 obviously we got the same papers you guys got on
 20 Friday afternoon. If I could just maybe quickly
 21 two — a few points on that. I actually thought
 22 it was quite interesting in that essentially if
 23 you were to read that document as sort of across
 24 the board, they admitted what I've been saying
 25 the entire time, that CGMs are in fact blood

1 issue an injunction is our number one, because,
 2 of course, if they just stopped it, it would
 3 allow them to continue the illegal conduct on a
 4 going forward basis just as soon as this case
 5 was resolved.

6 Next we — let me just make sure I —
 7 so I think another important aspect that we
 8 could get into, of course, is as we've been
 9 saying all along, basically in our view, you
 10 just have bad faith conduct from the get-go on
 11 the 27 — 1682-R throughout the whole process.
 12 So one aspect here is whether or not at the end
 13 of the day, and I think as Judge Mendoza said,
 14 whether or not they can be trusted with whatever
 15 they say now, and I think as Judge Mendoza said,
 16 again I know that we cited to, that he had
 17 significant concerns that whatever they say
 18 could be trusted, and that's one reason there,
 19 for example, he said no, it's not moot based on
 20 the TDL.

21 JUDGE CARSON: Well, let's just talk
 22 about this for just a second, and I don't mean
 23 to interrupt. But as far as the claims that you
 24 have that are currently ripe for a decision, you
 25 win. They agreed to that. You're not worried

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1 glucose monitors as that term is used in the
 2 statutes.

3 JUDGE CARSON: Yeah,
 4 congratulations.

5 MR. PISTORINO: Thank you, Your Honor.
 6 So across the board admitting, for example, that
 7 the technical direction letter you saw mentioned
 8 here, that that also did not stop the conduct.
 9 Again you saw Judge Mendoza in the Olson case
 10 out of Spokane say again that didn't stop it.
 11 So through Friday, I'll say in our view, the
 12 submission they made admitted that everything
 13 they'd said before was wrong and everything we
 14 said was right and so the case as it stood
 15 before the district court certainly was not moot
 16 and you still had the power, now coming to the
 17 effect potentially Friday's letter.

18 So generally we would just respond
 19 sort of three main points. First, I know we
 20 turned in a letter, I apologize for it, late
 21 Sunday night citing the W. T. Grant case from
 22 the Supreme Court going down the voluntary
 23 cessation points and, of course, pointing out
 24 that the mere ceasing of the illegal conduct
 25 does not deprive the Court of jurisdiction to

1 that they're going to go back after they
 2 confessed error and it was remanded for you to
 3 get your damages, that they're going to on those
 4 claims try to jerk the rug out from under you
 5 and say no, we're not going to pay them, we
 6 don't — we've changed our mind, we're not
 7 confessing here, right?

8 MR. PISTORINO: I agree with you in
 9 the sense I'm not concerned that Ms. Smith will
 10 not be paid for the three claims that are in
 11 this case. But I am concerned, number one, that
 12 there's been no finding that her CGM is durable
 13 medical equipment. Because there's no — sadly,
 14 there's no cure for type 1 diabetes that she
 15 suffers from, she will have continued claims
 16 going forward. And one aspect —

17 JUDGE CARSON: Right. So let me stop
 18 you there, so — and then you have other claims
 19 that are pending that have not been ruled on by
 20 a district court.

21 MR. PISTORINO: Correct.

22 JUDGE CARSON: And you also want as
 23 part of your relief with respect to your appeal
 24 from these three denials, you want relief as to
 25 those that you have that are pending?

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1 MR. PISTORINO: No, that's not
 2 correct.
 3 JUDGE CARSON: Well, that's what your
 4 injunction would do, isn't it? If you enjoin
 5 them from enforcing it, then it basically gives
 6 you a win on your other pending claims before
 7 the district court? Because if we're not doing
 8 that, I mean if you win on everything that's
 9 properly up here, what do you have? What are we
 10 enjoining? You've already won.

11 MR. PISTORINO: So I just want to make
 12 clear because I know there's many different
 13 claims at issue. So we have the three claims at
 14 issue in this case.

15 JUDGE CARSON: Right.

16 MR. PISTORINO: Three claims at issue
 17 in this case, let's focus on those for a
 18 moment.

19 JUDGE CARSON: Right, and that's my
 20 point. I mean there's nobody in this room, is
 21 there, that thinks that those claims are still
 22 in play? You won on those.

23 MR. PISTORINO: I think with regard to
 24 payment of those three claims, we won. But what
 25 we also asked for again was the nonmonetary

1 equipment under the statute, right. A
 2 declaration of that will have a real world
 3 effect in that in future claims by Ms. Smith,
 4 that would be determined and estop the Secretary
 5 from contending otherwise. We also asked — we
 6 have a cause of action saying that with regard
 7 to 1682, the Secretary did not comply with
 8 Congress' statute in 1395hh, as signed by the
 9 President, and subjected to notice and comment.

10 And what we asked for was a
 11 determination that that particular conduct,
 12 issuing rulings without complying with notice
 13 and comment, is violative of the statute, and I
 14 wanted an injunction estopping that. And what
 15 the Secretary has contended all along is, first,
 16 we as the Secretary, I have the power to violate
 17 the laws of Congress, I can act illegally,
 18 that's what they argued below, if you look at
 19 the appendix, their motion for summary judgment.
 20 Assuming I did violate the statute, Court, you
 21 have no power to control me. You cannot stop me
 22 from acting illegally.

23 So I think that's going to come right
 24 back to your question about what was the effect
 25 of yesterday — I'm sorry, Friday, what's the

1 relief, right, and there's different components
 2 of that.

3 JUDGE CARSON: Okay. But let me ask
 4 you, so your nonmonetary relief as it goes to
 5 those three claims, I mean what is it? I mean
 6 what are you getting with respect to those three
 7 claims other than payment?

8 MR. PISTORINO: You're getting —

9 JUDGE CARSON: You submitted them for
 10 payment. They denied it. You appealed. You
 11 won and now — but you also won an injunction.
 12 I just don't get with those three claims what's
 13 left.

14 MR. PISTORINO: Right. So you keep on
 15 saying we won, and I agree that we won in terms
 16 of the payment, but again I have multiple causes
 17 of action with different forms of relief. All
 18 the other ones are nonmonetary.

19 JUDGE CARSON: Okay. So tell me
 20 about — tell me how the rest of them still live
 21 after you get paid.

22 MR. PISTORINO: Right. So one thing
 23 we asked for, for example, just the most simple
 24 one, I might say, is a declaration that
 25 Ms. Smith's CGM qualifies as durable medical

1 effect of Friday. It just comes back. Have
 2 they ever disclaimed that position? No. That's
 3 the position they maintain. And again coming
 4 back to what they — or their goal, it appears
 5 to be, is to avoid judicial review of that
 6 solely for the purpose of preserving that claim.

7 So whatever they did on Friday, right,
 8 again I know what point I have here is that we
 9 keep on calling them rulings, right, 1682-R, the
 10 ruling. It's just a letter written by somebody
 11 at the department, right. The January 17th
 12 letter is just a letter written by a guy,
 13 Patrick Conway (ph.), just a letter written by
 14 a guy, right, totally illegal, again as it's
 15 been found adjudged in the Olson case, bad
 16 faith, just flat-out bad faith. And on the
 17 basis of that, right, again, for five years,
 18 tens of thousands of claims have been denied,
 19 hundreds of thousands actually, and tens of
 20 thousands of people have been injured.

21 And so if you just look at the conduct
 22 more recently, and candidly, I'm counsel in all
 23 of these cases —

24 JUDGE CARSON: Right.

25 MR. PISTORINO: Every single case is

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1 me. Every single step that they have taken has
 2 been an effort to avoid judicial review. So
 3 when they get a guy, for example, Mr. Olson and
 4 then I win, if they could have, they would have
 5 paid all his claims to make sure that he never
 6 came back while they continued the bad faith
 7 conduct, and that's exactly what Judge Mendoza
 8 pointed to.

9 JUDGE CARSON: But your theory is that
 10 they're going to rescind the rescission and —
 11 in other words, they've thrown in the towel
 12 through this letter ruling and that your concern
 13 is that there is — as soon as we turn our
 14 backs, they're going to rescind that letter
 15 ruling and start denying claims again. I mean
 16 that's — is that the path —

17 MR. PISTORINO: So maybe I'll look at
 18 it in three ways. First, first, the whole
 19 purpose of these efforts by them is to preserve
 20 their ability to do exactly that. So your
 21 starting point would be — again just maybe more
 22 globally, normally you just look at it and say
 23 from the voluntary cessation perspective at just
 24 a high level, when someone tells me they're not
 25 going to do it, what's the reason I'm going to

1 JUDGE CARSON: And he hasn't even
 2 tried to do it at this point, right?
 3 MR. PISTORINO: Right, right. They
 4 haven't tried —
 5 JUDGE CARSON: We'll find out in a few
 6 minutes, but since Friday they haven't tried
 7 to.
 8 MR. PISTORINO: They haven't tried to.
 9 And again what we would say is again from the
 10 voluntary cessation, you can trust me kind of
 11 things, what you're looking for are indications,
 12 bases under which to credit their statements.
 13 So normally it's something formal like a
 14 legislature takes action and you know that once
 15 the legislature takes action, it's going to be
 16 really hard to change that, and that's my whole
 17 point here.

18 These "rulings," they're just letters.
 19 There's no process. A guy signed a letter in
 20 2017. Tens of thousands of people are injured.
 21 On Friday, I guess Ms. Brooks decided she —
 22 they didn't want to show up here like that. She
 23 just signs the letter. If this Court were to
 24 dismiss the case, or any court, there's just
 25 absolutely no reason the next day, you sign the

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1 trust them, right? Why would I trust them, I
 2 think that was a phrase used, whether or not
 3 their change of behavior seems genuine, right,
 4 and what my point is, across the board here,
 5 it's not that it seems genuine.

6 It's the opposite. You know it was
 7 bad faith all the way through. That got you to
 8 Friday. Now you go to the voluntary cessation
 9 principles under which, of course, the Secretary
 10 bears — I think the phrases are typically the
 11 formidable burden, the heavy burden, a stringent
 12 standard. The Secretary would bear the burden
 13 of establishing all of that. And again just
 14 coming back, for example, to this Court's case
 15 in College America, another case, two main
 16 prongs, first the voluntary —

17 JUDGE CARSON: That doesn't sound like
 18 something we can do on appeal. That sounds like
 19 it needs to be argued somewhere else either in
 20 the administrative process or maybe back at the
 21 district court.

22 MR. PISTORINO: And at the end of the
 23 day, whatever is settled, my point is just it
 24 would be the Secretary's burden to establish it
 25 and again if you look —

1 letter and it's not like you say, well, I know
 2 that won't happen because they're reasonable.
 3 No, you know exactly the opposite, right. So —
 4 and again the other point, again I just had some
 5 notes —

6 JUDGE CARSON: Let me joust with you
 7 for a minute about a couple things because what
 8 concerns me is there's lots of things up in the
 9 air here and a lot of them seem really
 10 speculative to me. A lot of the things you say
 11 seem to be like concerning what might happen to
 12 other people. So I want to make sure we're
 13 focused on your client and what you're doing.
 14 Because you're not taking the position that you
 15 should get an injunction to protect other
 16 people, are you? Your position is that you want
 17 to go get an injunction so they can't do this to
 18 your client going forward, is that right?

19 MR. PISTORINO: I think actually the
 20 technical answer would be both.

21 JUDGE CARSON: Okay.

22 MR. PISTORINO: Because again under
 23 this, for example, National Mining — I know I
 24 cited cases from this Court, when you're
 25 litigating, exactly as we are here, the legality

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1 of the conduct, compliance with the statute,
 2 it's not just the statute for in this case
 3 Ms. Smith. It's for everybody. So our goal
 4 obviously just from a high level —

5 JUDGE CARSON: Right.

6 MR. PISTORINO: — this case is about
 7 \$5,000. No one's going to litigate the case for
 8 \$5,000 solely. It's very important to
 9 Ms. Smith. There are much bigger principles
 10 that are driving it here.

11 JUDGE CARSON: Got it. So I'm just
 12 thinking about the district court's remand here.
 13 I mean obviously I guess this two-line docket
 14 entry was followed up with a judgment.

15 MR. PISTORINO: No, the two-line was
 16 the judgment.

17 JUDGE CARSON: It was the judgment?

18 MR. PISTORINO: Yes.

19 JUDGE CARSON: So the court entered
 20 judgment —

21 MR. PISTORINO: With the two lines.

22 JUDGE CARSON: — in favor of you.
 23 And so because the government, basically they
 24 came in and confessed error?

25 MR. PISTORINO: The court entered —

1 Now, I get what you're saying, look,
 2 they're jerking the rug out from under everybody
 3 before, they're going to do it again, I don't
 4 want to just be right here again arguing the
 5 same thing to you and they give us a letter the
 6 day before saying they're not going to do it
 7 anymore. I get that, but that's sort of what —
 8 I'm just struggling with the idea that maybe
 9 we're dealing with a case where what you want is
 10 an injunction to prevent what might happen in
 11 the future, not that, you know, there's any
 12 imminent threat that is going to happen.

13 MR. PISTORINO: So if I can — and
 14 again I'm very conscious of my time. And very
 15 quickly to try to address it, so first —
 16 actually I was just sitting here thinking, at a
 17 high level manner, it's so ridiculous, it would
 18 be funny except for the tens of thousands of
 19 people that have been injured, right, except for
 20 the debts, okay, so number one —

21 JUDGE CARSON: Right.

22 MR. PISTORINO: I want to come your
 23 point about speculative. I think that's a fair
 24 thing, although again I know the second prong of
 25 voluntary cessation is complete eradication of

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1 the Secretary said in so many words —

2 JUDGE CARSON: Right.

3 MR. PISTORINO: — we'll pay your
 4 three claims, we'll give you that money, \$5,000,
 5 as long as the court does not address the
 6 illegality or any of the other stuff you say,
 7 that settlement offer rejected. The court went
 8 with that, said, okay, I'm going to adopt the
 9 rejected settlement offer. You say he entered
 10 judgment for me.

11 He entered judgment saying I want them
 12 to pay those three claims and everything else
 13 I'm silent on. And I'm sorry, I'm staying over
 14 my time.

15 THE CHIEF JUSTICE: We'll continue as
 16 long as Judge Carson jousts —

17 JUDGE CARSON: And I won't joust too
 18 long, but I'm just — I mean it concerns me
 19 because now what we're talking about is what
 20 they might do going forward. And in the face
 21 of — which sounds speculative to me without
 22 further denials. It concerns me that maybe this
 23 isn't ripe for a decision because the rest of
 24 what you want is based on what might happen in
 25 the future.

1 the effect. And of course, because they've been
 2 denying these claims for five years, tens of
 3 thousands of people have been dissuaded from
 4 even submitting the claims.

5 JUDGE CARSON: Right.

6 MR. PISTORINO: So again just from the
 7 thing that got submitted at 4:15 on Friday, how
 8 would anybody know, right? I mean was there
 9 some big publicity campaign that they sent
 10 emails — sent letters to everybody? No. From
 11 the public's perspective, it's another secret
 12 thing so they wouldn't know. So the second
 13 prong they could never show.

14 In terms of speculative, again their
 15 whole thing is have they stopped, have they
 16 forsaken the claim so they can issue rulings
 17 without complying with notice and comment, 1395?
 18 No, they have not. They maintain that they
 19 still can and that you all are completely
 20 powerless no matter how many people they kill.
 21 So is it speculative? Not really when that's
 22 the power they claim, right. That's what
 23 they're claiming as of today.

24 So, you know, again you talk about
 25 gamesmanship. Hey, something came in at 4:15,

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1 you know, two business days before their oral
 2 argument and the appeal and you just see the
 3 efforts of avoiding judicial review, so time and
 4 time again. The TDL, that came about because I
 5 had a motion for preliminary injunction pending
 6 in the Olson case, and I'd already had it
 7 pending. They thought they could knock it off
 8 with that -- this because I had already argued
 9 against the TDL, and it was obviously clearly
 10 improper. I appreciate your time. Thank you.

11 THE CHIEF JUSTICE: Are you done?

12 JUDGE CARSON: I'm finished.

13 THE CHIEF JUSTICE: Counsel, you may
 14 be seated then. Okay, let's hear from
 15 Mr. Koppel for the Department of Human Services.

16 MR. KOPPEL: Good afternoon, Your
 17 Honors. May it please the Court, I'm
 18 Josh Koppel on behalf of the United States.

19 Plaintiffs sought judicial review of
 20 Medicare's denial of three claims for payment.
 21 The Secretary confessed error and the district
 22 court properly entered judgment for plaintiff,
 23 ordering the Secretary to pay the claims.

24 JUDGE CARSON: Okay. So tell me this.
 25 What's the effect of that confession? Was it as

1 issue preclusion from denying this claim going
 2 forward in the future as to Smith?
 3 MR. KOPPEL: I don't know that there
 4 would necessarily be collateral estoppel based
 5 on that confession of error. That would be, you
 6 know, certainly for a future court to decide.
 7 But the Secretary has in the meantime taken
 8 additional action to ensure that these claims of
 9 plaintiff and of third parties will not be
 10 denied.

11 The Secretary in November 2020 issued
 12 a proposed rule and in December 2021 issued the
 13 final rule making clear that adjunctive and
 14 therapeutic continuous glucose monitors and
 15 insulin pumps that perform the functions of a
 16 CGM are durable medical equipment that are to be
 17 covered by Medicare. The Secretary -- I'm
 18 sorry, the CMS then issued —

19 JUDGE CARSON: Prospectively.

20 MR. KOPPEL: That was prospectively.
 21 And then CMS took action to apply that rule
 22 retroactively as well, first with the technical
 23 direction letter. That was the quickest way CMS
 24 could address the issue, although it left gaps,
 25 for example, Medicare Part C. And so then CMS

23

1 represented to me by your opposing counsel was
 2 it's these three claims, we'll pay them, but we
 3 want nothing to do with any other issue that's
 4 on the table?

5 MR. KOPPEL: The effect of the
 6 confession in the district court was that these
 7 three claims should have been paid and the
 8 Secretary will pay them. Now, the Secretary
 9 went beyond that and explained that the reason
 10 those claims should have been covered in the first
 11 instance is that plaintiff obtained supplies for
 12 an insulin pump that could also perform the
 13 functions of a continuous glucose monitor, and
 14 insulin pumps have been considered durable
 15 medical equipment covered by Medicare since the
 16 mid-1990s.

17 The Medicare Appeals Council, they
 18 failed to consider that and they got this wrong.
 19 So all of Ms. Smith's future claims related to
 20 her insulin pump should be paid.

21 JUDGE CARSON: All right. So —

22 MR. KOPPEL: Now even if she didn't —

23 JUDGE CARSON: So is it the
 24 government's position that they would be -- I
 25 mean through some sort of collateral estoppel or

1 worked toward this ruling that came out last
 2 week, and I want to be clear, this is not a
 3 letter signed by some guy. This is a ruling
 4 signed by the administrator of the Centers for
 5 Medicare and Medicaid Services.

6 This is a formal statement of
 7 coverage. And so last Friday CMS issued this
 8 CMS ruling, formally rescinding the 2017 CMS
 9 ruling, and making clear that for pending and
 10 future claims, regardless of the date of
 11 service, all continuous glucose monitors and
 12 insulin pumps that perform the functions of a
 13 continuous glucose monitor are durable medical
 14 equipment and will be covered by Medicare. That
 15 moots this case.

16 JUDGE CARSON: Can that be rescinded
 17 tomorrow?

18 MR. KOPPEL: CMS administrative
 19 rulings are not that easily rescinded, I'll say
 20 that.

21 JUDGE CARSON: They could, though —

22 MR. KOPPEL: In theory, it could be
 23 rescinded, but this Court — and with regards to
 24 voluntary cessation, the exception to mootness,
 25 we haven't had a chance to really brief this

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1 because the issue just arose. But this Court
 2 has repeatedly held that the withdrawal or
 3 alteration of administrative policies can moot
 4 an attack on those policies and that the mere
 5 possibility that an agency might rescind
 6 amendments to its actions does not align moot
 7 controversy.

8 And I encourage the Court to take a
 9 look at Denver Bible Church vs. Polis which was
 10 issued this year, Prison Legal News vs. Federal
 11 Bureau of Prisons in 2019 and Rio Grande Silvery
 12 Minnow vs. Bureau of Reclamation in 2010. All
 13 of those cases involved the rescission or
 14 alteration of an administrative policy, and this
 15 Court held that that rescission or alteration
 16 mooted the attack on the policy.

17 The government is accorded a
 18 presumption of good faith and unless there is
 19 some evidence that the government is going to
 20 rescind the rescission, the Court has held that
 21 the rescission or alteration moots the claim.

22 JUDGE CARSON: There is a history here
 23 of steadfast opposition to their statutory
 24 theory. We can't ignore that, can we?

25 MR. KOPPEL: Well, to — I want to

1 monitors as durable medical equipment. So
 2 there's no indication that CMS is going to pull
 3 the rug out. Second, even aside from mootness,
 4 so even if the voluntary cessation exception
 5 does apply, there's at least a question — or at
 6 least two questions. First, one of rightness.
 7 There's no — we don't know for sure what CMS
 8 will do with any particular claim until CMS has
 9 actually done that. And so a judicial ruling on
 10 a future claim is not yet right.

11 And second, there's a jurisdictional
 12 statutory authority issue, which is that a court
 13 doesn't have statutory authority, it doesn't
 14 have jurisdiction to consider a Medicare claim
 15 until it has been presented to the agency.
 16 There's no claim, other than the three here,
 17 that have already been paid and judgment has
 18 been entered and they've already been paid by
 19 CMS. No other claim has yet been presented to
 20 the agency and certainly has not yet reached the
 21 final agency decision.

22 And so the district court simply
 23 doesn't have jurisdiction to consider those
 24 future claims.

25 JUDGE CARSON: Aren't all those future

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1 answer that with — in two ways. First, I don't
 2 think that there is a history of bad faith.
 3 Even after some district courts have ruled that
 4 continuous glucose monitors are durable medical
 5 equipment, CMS did continue to apply the 2017
 6 CMS ruling, as it was entitled to do, with
 7 regard to other Medicare beneficiaries or other
 8 claims.

9 Of course, if there had been a Court
 10 of Appeals ruling on that issue, CMS would have
 11 had a different policy within that circuit. If
 12 there had been a Supreme Court ruling, of course
 13 that would have been definitive. But CMS was
 14 entitled to continue to apply that ruling and
 15 continue to test the ruling in court.

16 In November 2020 CMS reconsidered the
 17 issue, you know, in part due to, of course,
 18 these repeated holdings by district courts. And
 19 the continuous stream of actions since then has
 20 been in one direction, so issuing the proposed
 21 rule, issuing the final rule, issuing the TDI,
 22 issuing this new CMS ruling.

23 Every action CMS has taken has
 24 actually been to move toward covering for all
 25 dates of service these continuous glucose

1 claims going to be paid under the May 13th
 2 ruling?

3 MR. KOPPEL: They absolutely should
 4 be, and that is just an additional reason that
 5 there's no — there's no cause for the district
 6 court to issue a decision on the validity of the
 7 2017 CMS ruling. That would be an advisory
 8 opinion.

9 And you know, plaintiff has — shifts
 10 tactics here. Instead of simply seeking a
 11 decision on the 2017 CMS ruling, which would be
 12 an advisory opinion, now plaintiff seeks an
 13 advisory opinion on whether CMS rulings
 14 generally can be issued without notice and
 15 comment. That's certainly an advisory opinion.
 16 It depends —

17 JUDGE CARSON: The plaintiff — are
 18 you taking the position that claimants still
 19 need to appeal their claims up to the MAC for
 20 all these pending cases?

21 MR. KOPPEL: If there is a future
 22 claim for coverage of a continuous glucose
 23 monitor that is denied, that does need to be
 24 appealed to the Medicare Appeals Council. After
 25 that, CMS issues a final — or HHS issues a

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1 final agency decision. Only after that does the
 2 statute permit the district court to exercise
 3 jurisdiction and provide judicial review.

4 JUDGE CARSON: I guess my question is
 5 different then. Are the administrators, the
 6 ALJs and the MAC still going to be relying on
 7 1682-R —

8 MR. KOPPEL: No.

9 JUDGE CARSON: — or is that gone?

10 MR. KOPPEL: That is gone. The 1682-R
 11 has been rescinded.

12 JUDGE CARSON: So a claim that's
 13 pending before the administrator, the ALJ or the
 14 MAC basically should be adjudicated immediately
 15 in favor of the claimant?

16 MR. KOPPEL: Yes.

17 JUDGE CARSON: Are there any
 18 exceptions to that? Will this be all glucose
 19 monitoring claimants or do — I might have heard
 20 you say that the monitor needed to be connected
 21 to another durable medical device. Did I
 22 misunderstand that?

23 MR. KOPPEL: No, the continuous
 24 glucose monitor itself is the durable medical
 25 equipment. So there are —

1 we're in a position to really evaluate that
 2 claim yet.

3 MR. KOPPEL: Yeah. So because
 4 voluntary cessation goes to mootness and
 5 mootness is a jurisdictional issue, I believe
 6 that this Court has an independent duty to make
 7 a decision on the mootness question itself. You
 8 know, some of those cases that I cited, Denver
 9 Bible Church, Prison Legal News, Rio Grande, at
 10 least some of those I know that rescission and
 11 alteration of the administrative policy under
 12 attack was issued while the case was on appeal
 13 and this Court went ahead and made the decision
 14 on mootness itself.

15 And you know, it is true that the
 16 court has stated generally the party arguing in
 17 favor of mootness bears the burden to show that
 18 the challenged action won't be repeated, but the
 19 court has also made clear in those cases that
 20 where the challenged action was in an
 21 administrative policy that has been rescinded or
 22 altered, the burden is not quite so burdensome.
 23 And in fact, the burden may even shift to the
 24 plaintiff in those cases to show that there is
 25 some cause to think that the government will

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1 JUDGE CARSON: Standing alone, those
 2 get covered now under this new policy?

3 MR. KOPPEL: Yes. Of course, provided
 4 that the beneficiary actually has diabetes, you
 5 know, and that it's diagnosed and they have to
 6 be to using a dedicated continuous glucose
 7 monitor, not a phone, like an iPhone, because
 8 that has a — the primary purpose of that is not
 9 medical. But the mine run of cases, generally
 10 speaking, what we're talking about here,
 11 continuous glucose monitors starting immediately
 12 are considered durable medical equipment. Those
 13 claims will be paid. That's regardless of the
 14 date service. And even if a claim has been —
 15 has already been denied, if that claim is still
 16 pending, you know, it's on appeal to an ALJ, the
 17 latest CMS ruling issued by the administrator
 18 makes clear that that claim is to be reopened
 19 and paid.

20 JUDGE CARSON: And I guess this lawyer
 21 would know his way around the agency process,
 22 but I also have a question on the voluntary
 23 cessation. Why doesn't that still need to be
 24 resolved somehow, either by this panel or by a
 25 district court somewhere? I don't know that

1 pull the rug out.

2 And certainly, you know, there's no
 3 cause to think that these are formal rulings,
 4 and keep in mind that the CMS ruling applies to
 5 a closed set of cases because for dates of
 6 service February 28th, 2022 going forward, those
 7 cases, those claims are governed by the 2021
 8 final ruling, which went through notice and
 9 comment, you know, a very formal rule-making
 10 process. That really cannot easily be reversed
 11 absent another notice and comment process.

12 So the CMS ruling applies to a closed
 13 set of cases that every day is diminishing, and
 14 there is no indication that the CMS
 15 administrator for any reason would want to all
 16 of a sudden switch policy with regard to that
 17 closed and diminishing set of cases. And of
 18 course, you know, the CMS administrator cannot
 19 reverse the 2021 final rule, you know, so
 20 easily. So the idea that the CMS ruling will be
 21 reversed again as soon as this Court issues its
 22 decision is quite implausible.

23 JUDGE CARSON: Let me ask you a
 24 question. Are you familiar with the plaintiffs'
 25 district court actions that are pending?

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1 MR. KOPPEL: Some of them. I'm not as
 2 familiar with the ones —
 3 JUDGE CARSON: Okay.
 4 MR. KOPPEL: With all of them.
 5 JUDGE CARSON: Do you know as -- why
 6 hasn't the government confessed error in those
 7 cases? Why didn't — when they determined that
 8 the three claims in this case should be paid
 9 because the interpretation was wrong, why didn't
 10 they confess error in those cases too?
 11 MR. KOPPEL: I'm not — I'm sorry, I
 12 can't speak to those.
 13 JUDGE CARSON: Okay.
 14 MR. KOPPEL: I'm not familiar enough
 15 with them.
 16 JUDGE CARSON: Let me tell you why I'm
 17 asking you.
 18 MR. KOPPEL: Yeah.
 19 JUDGE CARSON: Because doesn't the
 20 fact that they would confess error here and not
 21 confess error in those cases suggest that it was
 22 gamesmanship to confess error here and get this
 23 case off the books?
 24 MR. KOPPEL: So, you know, one reason
 25 is that the Secretary confessed error here

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1 MR. KOPPEL: The other claims are
 2 other plaintiffs. Those other cases also
 3 involve ancillary issues. So, for example,
 4 there's a case in the District of Columbia where
 5 plaintiffs were trying to seek payment of claims
 6 that had not been appealed and where the time to
 7 appeal had run. And so there are questions of
 8 whether the district court had jurisdiction over
 9 those.

10 I believe that in Olson, some of the
 11 issues relate not to whether the claims should
 12 have been paid but whether — what the
 13 appropriate relief is, whether injunctive relief
 14 should be issued, attorneys' fees, that kind of
 15 thing. So I don't — I don't want to speak to
 16 those other cases. I'm not familiar enough with
 17 them to speak to them, but I'm not sure it's
 18 true that the Secretary continues to not pay —
 19 you know, continues to take the position that
 20 continuous glucose monitors are not durable
 21 medical equipment.

22 JUDGE CARSON: Okay.
 23 MR. KOPPEL: And certainly this latest
 24 CMS ruling I believe should make clear that, you
 25 know, continuous glucose monitors are durable

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1 immediately because plaintiff was using not just
 2 a stand-alone continuous glucose monitor but an
 3 insulin pump that also performs the functions of
 4 a continuous glucose monitor, and that's really
 5 a different category. Insulin pumps have been
 6 durable medical equipment again since the
 7 mid-1990s. So that's why the Secretary was able
 8 to confess error here, you know, so quickly.
 9 I do expect that with this new CMS
 10 ruling, you know, the position may change in
 11 those other courts. I'm not sure —
 12 JUDGE CARSON: I don't understand why
 13 that's different from counsel's other case. As
 14 I understand it, it's the same plaintiff, same
 15 equipment, different payments. These just
 16 happen to have had a decision and could come up
 17 on appeal. Those are still pending with no
 18 ruling. And if they're the same and you confess
 19 as to three and you don't confess as to the
 20 others, I mean doesn't that suggest you're
 21 trying to evade review?
 22 MR. KOPPEL: So it's certainly not the
 23 same plaintiff, I want to be clear about that.
 24 Smith — this is Smith's only action.
 25 JUDGE CARSON: Okay.

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1 medical equipment going forward, you know, from
 2 here on, regardless of the date of service, even
 3 for past dates of service.

4 JUDGE CARSON: Before you sit down, I
 5 had a question on the equitable relief. It
 6 seems to me that the cases that I've reviewed
 7 strongly suggest that 405(g) is a permissible
 8 vehicle for some forms of equitable and
 9 declaratory relief, and I'm not sure you really
 10 denied that or opposed that in your papers. But
 11 do you agree that a district court could order
 12 in an appropriate case some form of equitable
 13 relief, an injunction or a declaratory judgment?

14 MR. KOPPEL: Califano vs. Yamasaki
 15 holds that some form of equitable relief is
 16 available. I'm not sure — and we took the
 17 position, although we continue to take the
 18 position that setting aside or enjoining a rule
 19 to apply — such that the injunction would
 20 require the Secretary to pay future claims that
 21 haven't yet been presented —

22 JUDGE CARSON: Well, that's a merits
 23 question.

24 MR. KOPPEL: Right.
 25 JUDGE CARSON: I'm talking about the

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1 broader judicial power question.
 2 MR. KOPPEL: There is some set of
 3 equitable remedies that are available. You
 4 know, Califano vs. Yamasaki addressed equitable
 5 powers to ensure the pending -- that the
 6 pending -- the status quo remains pending
 7 resolution of litigation or to protect the
 8 interests of the absent class members. So
 9 certainly those kinds of equitable powers are
 10 available. You know, here --

11 JUDGE CARSON: I think that's a recent
 12 DC circuit case, Parzakansky (ph.), that also
 13 suggests equitable relief was proper in some
 14 circumstances.

15 MR. KOPPEL: Exactly. But as that
 16 case makes clear, and I think that's a very --
 17 quite analogous case. Just because Califano
 18 held that equitable remedies are available, it
 19 doesn't mean -- it didn't determine when they're
 20 available. And where the plaintiff, and this is
 21 what Parzakansky held, where the plaintiff seeks
 22 equitable relief to decide future claims that
 23 haven't been yet presented to the agency and
 24 haven't yet reached a final agency decision,
 25 those equitable remedies are not available.

1 applies a CMS ruling to a claim properly and the
 2 Secretary confess -- you know, contests or
 3 continues to contest the claim before the
 4 district court, the district court can consider
 5 the validity of the CMS ruling and if it's
 6 invalid, that would be a basis to reverse and
 7 remand.

8 The question that the district court
 9 didn't get to, and I don't think this Court
 10 needs to, is whether the district court can then
 11 issue an injunction saying this CMS ruling also
 12 shouldn't be applied in future cases because
 13 that decides claims that haven't yet been
 14 presented to the agency.

15 But in terms of deciding for purposes
 16 of a present live claim for Medicare coverage
 17 whether a CMS ruling is properly issued,
 18 absolutely the circuit court can do that, and
 19 that allows the Court of Appeals to rule on the
 20 issue, potentially the Supreme Court, and we
 21 certainly don't take issue with that.

22 In this case, however, not only is the
 23 issue moot, but for all the reasons we've
 24 explained, even if the issue were not moot, the
 25 decision of the district court should be

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1 JUDGE CARSON: But why wouldn't here a
 2 declaration that the Secretary's interpretation
 3 of the statute is wrong, why wouldn't that --
 4 that just seems like a pretty garden variety
 5 remedy that, you know, actually to the extent it
 6 applies to, you know, thousands of other
 7 claimants would be a good thing because it would
 8 resolve the legal authority of the agency. You
 9 know, maybe the district court issues a
 10 declaratory judgment that's appealed to a
 11 circuit, you know, or whatever. But that just
 12 seems like kind of something that happens every
 13 day in the district courts.

14 MR. KOPPEL: So in the appropriate
 15 case, a court can rule on the validity of a CMS
 16 ruling. So I mean there's a number of reasons
 17 that this district court couldn't and shouldn't
 18 go forward, you know, mootness, the 2017 CMS
 19 ruling has been rescinded, the plaintiff's claim
 20 wasn't properly decided under the 2017 CMS
 21 ruling because that ruling didn't apply to
 22 insulin pumps. The appeals council erred in
 23 applying the 2017 CMS ruling to plaintiff's
 24 claim.

25 But in a case where, you know, HHS

1 affirmed. Thank you.

2 THE CHIEF JUSTICE: Counsel, we
 3 understand both your arguments. Thank you very
 4 much for clarifying the situation for us.
 5 You're excused. Your case shall be submitted,
 6 and the Court will be in recess until 9 o'clock
 7 tomorrow morning, I believe.

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1	UNITED STATE COURT OF APPEALS	
2	FOR THE TENTH CIRCUIT	
3	*****	*****
4	LINDA P. SMITH	
5	Plaintiff-Appellant	
6	-vs-	Case 22-4012
7	XAVIER BECERRA, in his capacity as	
8	Secretary of the United States	
9	Department of Health and Human Services,	
10	*****	*****
11	Defendant-Appellee.	
12	C E R T I F I C A T E	
13		
14	I, LISA A. CREERON, do hereby certify I took in	
15	shorthand the proceedings held in the above-entitled	
16	matter on the 17th day of May, 2022, and that the	
17	attached is a true and correct transcription of the	
18	proceedings so taken, to the best of my ability.	
19	In witness whereof, I have hereunto set my hand	
20	and affixed my seal of office this 21st day of May, 2022.	
21		
22	Notary Public, State of Wisconsin	
23	My Commission Expires: 1/30/2025	
24		
25		

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EXHIBIT B

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EXPERIENCE:

- September 2015 – present **PARTNER:** Parrish Law Office: Litigation/Appellate practice.
- March 2011 – September 2015 **PARTNER.** Perkins Coie, LLP. Intellectual Property litigation involving patents and copyrights and breach of contract actions in federal courts and arbitrations.
- 2004-2011, 1996-2004 **PARTNER/ASSOCIATE.** Howrey Simon Arnold & White (formerly Arnold, White & Durkee). Involved in full range of intellectual property representation including patent, copyright, trademark, and trade secret litigation, patent and trademark prosecution, motion and appellate practice, contracts, and legal research. Special emphasis on computer software related issues.
- March – May 2001 **ASSISTANT DISTRICT ATTORNEY.** Dallas County District Attorney's Office. Participated in the Lawyer's On Loan program prosecuting misdemeanor cases. Prosecuted thirteen (13) jury trials and five (5) trials before the Court.
- May - August, 1995 **LAW CLERK.** United States International Trade Commission, Office of Unfair Import Investigations. Legal research and memoranda related to patent infringement litigation.

REPRESENTATIVE MATTERS:

- Driessen v. Sony Music Entertainment, et al.* (Utah)
Defend Sony Music, Best Buy, Target, FYE in patent case involving music cards
- Clouding v. Amazon, Inc., et al.* (Del)
Defend Amazon, Rackspace, Dropbox in cases related to cloud computing
- Round Rock Research LLC v. AsusTek Computer Inc., et al.* (Del)
AsusTek Computer Inc. et al. v. Round Rock Research LLC (ND Cal)
Defend AsusTek in cases involving 16 patents related to computer components
- Technology Innovations Associates, LLC v. Google, Inc.* (Del)
Defend Google in patent case involving user interfaces
- Mount Hamilton Partners LLC v. Google, Inc.* (ND Cal)
Defend Google in patent case related to coupons
- FuzzySharp Technologies Inc. v. Intel Corp.* (ND Cal)
Defend Intel in patent case related to 3D graphics
- Princeton Digital Imaging Corp. v. Amazon.com/Netflix* (Del) (ongoing)
Represent Amazon/Netflix in patent case involving JPEG
- Techsavies LLC v. WDFA Marketing, Inc.* (ND Cal) (2010-2011)

Pistorino Resume
Page 2

Represent TechSavies in breach of contract/copyright matter
Scientific Plastic Products, Inc. v. Merck & Co., Inc., et al. (SD Cal) (2009)
Defend Merck in patent case related to flash chromatography
CalCars, Inc. v. California Cars Initiative, Inc. (CD Cal) (2008)
Defend CCI in trademark infringement dispute
Anticancer v. Merck & Co., Inc. et al. (SD Cal) (2007-10)
Defend Merck in five patent case related to green fluorescent protein
Visto Corp. v. Seven Networks, Inc. (ED Tex) (2005-2007)
Defend Seven in multiple cases related to email synchronization
Streck Laboratories v. Beckman Coulter et al (Neb) (1999-2000)
Represent Streck in patent case related to blood substitutes

ADMISSIONS:

State Bars of California and Texas, United States Patent & Trademark Office,, numerous Courts of Appeals, including the Supreme Court

EDUCATION:

Duke University School of Law, Durham, NC.

J.D. May 1996

Duke University, Durham, NC.

B.S. with Distinction in Computer Science May 1993

PUBLICATIONS/MEMBERSHIPS:

SF Bay Area IP Inn of Court

President (2012 –2014), Vice-President (2010-12), Treasurer (2008-10)

University of California Hastings Schools of Law (Spring 2013-Spring 2016t)

Adjunct professor, Patent Litigation

Santa Clara University (Summer 2012)

Adjunct professor, Patent Litigation Strategies and Tactics

James C. Pistorino, *2012 Trends in Patent Case Filings*, BNA, (February 2013)

James C. Pistorino, *2011 Trends in Patent Case Filings*, BNA, (March 2012)

James C. Pistorino, *Concentration of Patent Cases Increases in Eastern District of Texas in 2010*, BNA, (April 2011)

James C. Pistorino, *Another Way to Attack Written Description in Re-Exam*, IPLaw360 (August 2010)

Glenn W. Rhodes, *PATENT LAW HANDBOOK* (1998-99, 1999-2000 eds)
Chapter on summary judgment, portions of chapter on equitable defenses.

James C. Pistorino, *Recent Developments in Patent Law*, 6 TEX. INTELL. PROP. LAW. J. 355 (1998).

Numerous speeches to ACC and other groups.



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PRACTICE FOCUS

Natural resources and public lands law with emphasis on acquisition, exploration, permitting and production of oil, gas, and mining properties; oil and gas conservation matters; complex title examinations; administrative hearings and appeals; natural resources litigation and appeals; mergers and acquisitions; mineral financing; water rights; natural resources law on Indian reservations; and expert witness for mineral and public lands-related matters.

EDUCATION

University of Utah (J.D., 1975; H.B.A., magna cum laude, 1969)

Phi Beta Kappa, Phi Alpha Theta
Graduate, Honors College

COURT ADMISSIONS

United States Supreme Court

United States Court of Appeals, Ninth and Tenth Circuits

United States Court of Federal Claims

United States District Courts, Districts of Utah and Colorado, District of Columbia

Supreme Courts of Utah and Colorado Ute Indian Tribal Court, Uintah and Ouray Reservation (Utah)

PROFESSIONAL MEMBERSHIPS AND ACTIVITIES

American Bar Association

Utah, Colorado State Bars

Salt Lake County Bar Association

Rocky Mountain Mineral Law Foundation

President (2002-2003) Vice President-President Elect (2001-2002);

Secretary (1997-1998) Member-at-Large, Executive Committee (1994-1996)

Trustee (1984-1987, 1989-1991, 1994-1997, 1999-present)

Program Chair, 35th Annual Rocky Mountain Mineral Law Institute (1989)

American Association of Professional Landmen / Chair, Special Institutes Committee (1990-1996)

Utah Association of Professional Landmen, President (1997-1998)

Utah Petroleum Association / Petroleum Association of Wyoming

OTHER PROFESSIONAL EXPERIENCE

Founder and Senior Partner, Lear & Lear PLLC (2001-2016)

Partner, Snell & Wilmer, Salt Lake City, Utah (1993-2001)

Shareholder, Van Cott, Bagley, Cornwall and McCarthy, Salt Lake City, Utah (1979-1993)

Associate, Pruitt & Gushee, Salt Lake City, Utah (1975-1979)

Lieutenant, United States Navy (1969-1972)

REPRESENTATIVE PUBLICATIONS

- Use of Technology in the Preparation of an Opinion and Calculations Workshop*, ADVANCED MINERAL TITLE EXAMINATION, PAPER 24 (Rocky Mt. Min. L. Fdn. 2014).
- Mineral Title Examinations: The Whos, Whats, Whens, Wheres, and Whys of Mineral Title Assurance*, MINERAL TITLE EXAMINATION IV, PAPER 1 (Rocky Mt. Min. L. Fdn. 2007).
- Split Estates and Severed Minerals: Rights of Access and Surface Use after the Divorce (and Other Leasehold Access-Related Problems)*, 50 ROCKY MT. MIN. L. INST. 10-1 (2004) [co-authored].
- Rights of Access and Permitting for Coalbed Methane*, Society of Professional Engineers Applied Technology Workshop; Coal Bed Gas Resources of Utah, SPE Paper No. 87084 (2003).
- Coal and Coalbed Methane Development Conflicts Revisited: The Oil and Gas Perspective*, PUBLIC LAND LAW, REGULATION, AND MANAGEMENT, Paper 10 (Rocky Mt. Min. L. Fdn. 2003).
- The Ethical Landman: All you Need to Know about Ethics You Learned in Sunday School*, ETHICS & PROF. RESPONSIBILITY (Rocky Mt. Min. L. Fdn. 2000).
- Access to Indian Land and Title Records: Freedom of Information, Privacy, and Related Issues*, NAT. RESOURCES DVPT. & ENVT. REG. IN INDIAN COUNTRY, Paper 4-1 (Rocky Mt. Min. L. Fdn. 1999) [co-authored].
- Utah Oil and Gas Conservation Law & Practice*, 1998 UTAH L. REV. 89 (1998); ONSHORE POOLING & UNITIZATION Paper 5C (Rocky Mtn. Min. L. Fdn. 1997).
- Cooperative Multiple Mineral Development Agreements: A Nuts and Bolts Approach*, 43 ROCKY MTN. MIN. L. INST. 3-1 (1997).
- Modern Oil & Gas Conservation Practice: And You Thought the Law of Capture was Dead?*, 41 ROCKY MTN. MIN. L. INST. 17-1 (1995) [co-authored].
- Exhaustion of Tribal Court Remedies and Federal Questions: Rejecting Bright-Line Rules and Affirmative Action*, 71 N.D. L. REV. 277 (1995) [co-authored].
- Division Order Issues in the 1990's: State Policing of an Unresponsive Industry*, OIL & GAS ROYALTIES ON NON-FEDERAL LANDS, Paper 6 (Rocky Mt. Min. L. Fdn. 1993).
- Multiple Mineral Development Conflicts in Coalbed Methane Operations*, COALBED GAS DEVELOPMENT: EAST AND WEST, Paper 4A (Rocky Mt. Min. L. Fdn. 1992).
- Accretion, Reliction, Erosion, and Avulsion: A Study in Riparian and Littoral Title Problems*, 29 PUB. LAND & RESOURCES L. DIG. 11 (1992); 11 J. ENERGY, NAT. RESOURCES & ENVT. L. 265 (1991).
- Conflicts in Simultaneous Mineral Operation Revisited: Armageddon One Day Closer*, THE LANDMAN [Part: 1 Jan/Feb]; [Part 2 Mar/Apr]; [Part 3 May/June] (American Assoc. of Petroleum Landmen 1992).
- Representations, Warranties, Covenants, Conditions, and Indemnities: Stitching Them Together in the Purchase Agreement*, 37 ROCKY MT. MIN. L. INST. 3-1 (1991).
- Conservation Principles and Federal Onshore Pooling and Unitization: An Overview*, FEDERAL ONSHORE POOLING AND UNITIZATION 11, Paper I (Rocky Mt. Min. L. Fdn. 1990).
- First Purchaser Suspense Accounts*, 33 ROCKY MT. MIN. L. INST. 17-1 (1988).
- Chapter XXIII Conflicts in the Development of Other Minerals*, 2 LAW OF FEDERAL OIL AND GAS LEASES (Rocky Mt. Min. L. Fdn., Rel. 2008).
- Multiple Mineral Development Conflicts: An Armageddon in Simultaneous Mineral Operations?*, 28 ROCKY MT. MIN. L. INST. 79 (1983).
- Examination of Title to Fee Lands*, MINERAL TITLE EXAMINATION 11, Paper 2 (Rocky Mt. Min. L. Fdn., 1982); Chapter 92, *Examination of Title to Fee Lands*, 3 AMERICAN LAW OF MINING (Rocky Mt. Min. L. Fdn., Rel. 20-7/85).
- Lurking Title Problems: Snares for the Unsuspecting Federal Oil and Gas Lease Title Examiner*, 25 ROCKY MT. MIN. L. INST. 18-1 (1980).
- Utah's Short Statutes of Limitations for Tax Titles: The Continuing Specter of Lyman v. National Mortgage Bond Corp. - A Need for Remedial Legislation*, BYU L. REV. 457 (1976).
- Tax Sales and Tax Titles in Utah: Windfalls and Windstorms*, 1 J. CONTEMP. L. 299 (1975).

PRESENTATIONS AND SEMINARS

- "Use of Technology in the Preparation of an Opinion and Calculations Workshop," Advanced Mineral Title Examination, Rocky Mountain Mineral Law Foundation (Denver, Colorado, January 2014).
- Mineral Title Examinations: The Whos, Whats, Whens, Wheres, and Whys of Mineral Title Assurance, Mineral Title Examination IV (Denver, Colorado, September 2007).
- Split Estates and Severed Minerals: Rights Of Access and Surface Use after the Divorce (and Other Leasehold Access-Related Problems, Rocky Mountain Mineral Law Foundation (Vail, Colorado, July 2004).
- Coal and Coalbed Methane Development Conflicts Revisited: The Oil and Gas Perspective, Rocky Mountain Mineral Law Foundation (Santa Clara, New Mexico, May 2003).

Rights of Access and Permitting for Coalbed Methane, Society of Professional Engineers Applied Technology Workshop, Coalbed Gas Resources of Utah (Alta, Utah, October 2003).

Post-Production Costs, 30th Annual Institute of the National Association of Division Order Analysts (Salt Lake City, September 2003); Utah Association of Professional Landmen (Salt Lake City, 2003); Rocky Mountain Association of Petroleum Accountants (Salt Lake City, 2003).

The Ethical Landman: All you Need to Know About Ethics You Learned in Sunday School, Special Institute of the Rocky Mountain Mineral Law Foundation (Denver, December 2000), AAPL Annual Meeting (Salt Lake City, June 2001).

Access to Indian Land and Title Records: Freedom of Information, Privacy, and Related Issues, Special Institute of the Rocky Mountain Mineral Law Foundation (Denver, May 1999).

Cooperative Multiple Mineral Development Agreements: A Nuts and Bolts Approach, 43rd Annual Rocky Mountain Mineral Law Institute (Portland, July 1997).

Utah Oil and Gas Conservation Law & Practice, Onshore Pooling & Unitization, Special Institute of the Rocky Mountain Mineral Law Foundation (Denver, January 1997).

Modern Oil & Gas Conservation Practice: And You Thought the Law of Capture was Dead?, 41st Annual Rocky Mountain Mineral Law Foundation (Sun Valley, June 1995).

Symposium: Natural Resources Development and Tribal Rights, North Dakota Law Review, University of North Dakota School of Law (Grand Forks, April 1995).

Ethical Considerations for Landmen, CLE sponsored by the Utah Association of Petroleum & Mining Landmen (Salt Lake City, February 1995).

Multiple Mineral Development Conflicts between Oil and Gas and Trona in Southwestern Wyoming, Annual Meeting of the Rocky Mountain Oil & Gas Association (Denver, September 1994).

Symposium: Royalty and Division Order Issues in the Rocky Mountain States; 20th Annual Institute of the National Association of Division Order Analysts (San Diego, September 1993).

Division Order Issues in the 1990's: State Policing of an Unresponsive Industry, Oil & Gas Royalties on Non-Federal Lands, Special Institute of the Rocky Mountain Mineral Law Foundation (Santa Fe, April 1993).

Symposium: Indian Mineral Development Act, 1992 Field Symposium of the Utah Geological Association (Vernal, Utah, May 1992).

Multiple Mineral Development Conflicts in Coalbed Methane Operations, Coalbed Gas Development: East and West Special Institute of the Rocky Mountain Mineral Law Foundation (Santa Fe, March 1992).

Representations, Warranties, Covenants, Conditions, and Indemnities: Stitching Them Together in the Purchase Agreement, 37th Annual Rocky Mountain Mineral Law Institute (Monterey, July 1991).

Accretion, Reliction, Erosion, and Avulsion: A Study in Riparian and Littoral Title Problems, 18th Annual Institute of the National Association of Division Order Analysts (Washington, D.C., September 1991).

Conflicts in Simultaneous Mineral Operation Revisited: Armageddon One Day Closer, 37th International Conference and Annual Meeting of the American Association of Petroleum Landmen (Denver, June 1991).

Symposium: Northern Rocky Mountains Workshop--Trusts: Concepts and Problems for Division Order Analysts; Statutory Pooling Orders; Descent and Distribution: Rudiments of Intestacy Law for Division Order Analysts; Oil and Gas Royalty Provisions: A Review for Division Order Analysts; 17th Annual Institute of the National Association of Division Order Analysts (Phoenix, August 1990).

Public and Indian Land Issues in Commercial Transactions, Environmental & Natural Resources Issues in Commercial Transactions, CLE of the Utah State Bar (Salt Lake City, April 1990).

Conservation Principles and Federal Onshore Pooling and Unitization: An Over-view, Federal Onshore Pooling and Unitization II, Special Institute of the Rocky Mountain Mineral Law Foundation (Denver, January 1990).

First Purchaser Suspense Accounts, 33rd Rocky Mountain Mineral Law Institute (Vail, Colorado, July 1987); Houston Association of Division Order Analysts (Houston, May 1988); National Association of Division Order Analysts (Denver, September 1989).

Multiple Mineral Development Conflicts: An Armageddon in Simultaneous Mineral Operations? (Vail, Colorado, July 1982).

Examination of Title to Fee Lands, Rocky Mountain Mineral Law Foundation (Tucson, April 1982).

Lurking Title Problems: Snares for the Unsuspecting Federal Oil and Gas Lease Title Examiner (Seattle, July 1979).

Debra M. Parrish

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Pittsburgh, PA 15228
412-561-6250

1050 Conn. Ave., 10th Fl.
Washington, DC 20036
202-772-4254

debbie@dparrishlaw.com
412-561-6253 (fax)
412-337-2718 (cell)

PROFESSIONAL EXPERIENCE

- **Parrish Law Offices, 1999-Present**
Representing and counseling health care providers, research institutions, journals and life science companies in the areas of health care law (including reimbursement for innovative technology), science law (compliance with research regulations, investigations and research misconduct), intellectual property (including litigation, licensing, contracts and employee agreements).
- **Titus & McEconomy LLP, elected partner in 1996, 1994-1999**
Involved in complex litigation, science law (including research misconduct and research regulations, compliance and investigations including criminal investigations of life science companies), intellectual property (patent prosecution and litigation) and health care law.
- **Office of Research Integrity, Office of the General Counsel, Department of Health & Human Services, 1992-1994**
Drafted rules and regulations governing scientific misconduct and research fraud; reviewed, investigated and prosecuted allegations of scientific misconduct.
- **Fulbright & Jaworski, Washington, DC, Associate, 1989-1992**
Represented national health care clients on medical staff issues, Medicare/Medicaid reimbursement, and litigation involving health care providers; litigated intellectual property cases.

EDUCATION

- **J.D., Duke University School of Law**
- **B.S.E., Biomedical Engineering, Duke University**
- **M.P.H., Johns Hopkins Bloomberg School of Public Health (expected 2021)**

BAR MEMBERSHIPS AND ASSOCIATIONS

- **United States Court of Appeals for the Second Circuit**
- **United States Court of Appeals for the Ninth Circuit**
- **United States Court of Appeals for the Eleventh Circuit**

- **American Health Lawyers Association**
- **Society for Research Administrators**
- **National Association of College and University Attorneys**
- **American Bar Association, 2017 winner of the *Pro Bono Publico* Award**
- **Pennsylvania, North Carolina, District of Columbia and Florida Bar**
- **Patent Bar**
- **Allegheny County Bar Association**
- **Public Responsibility in Medicine and Research**
- **Council of Science Editors**

ACTIVITIES

- **Council of Science Editors**, Editorial Policy Committee, 2004-Present
- **International Business Ethics Institute**, Director and Consultant, 1994-present
- **Institutional Review Board**, University of Pittsburgh Medical Center, 1994-1999
- **Adjunct Professor, University of Pittsburgh Medical Center**, Spring 2016

SELECTED SPEECHES

National Presentations

- **“Research Misconduct: A Year in Review,”** Society of Research Administrators International, San Francisco, CA, October 2019 and October 2020.
- **“Patents and IP Protection: Why They Matter to Us,”** Society of Research Administrators International, San Francisco, CA, October 2019.
- **“Advocacy for Medicare Coverage for Diabetes,”** American Association of Diabetes Educators, Baltimore, MD, August 2018.
- **“DMEPOS Update,”** American Health Lawyers Association, Baltimore, MD, March 2017.
- **“Master Class: Billing Compliance,”** MAGI’s Clinical Research Conference, Las Vegas, NV, October 23, 2016.
- **“Research Misconduct: A Year in Review,”** Society of Research Administrators, Annual Meeting, San Antonio, TX, October 26, 2016.
- **“The Journals’ Role in Research Misconduct Cases,”** Society of Research Administrators, Annual Meeting, San Antonio, TX, October 25, 2016.
- **“Patient Access to Medications,”** panel discussion, Corporate AACE Partnership (CAP), Boston, MA, October 14, 2016.

- **“Standardization of Processes for Handling Research Misconduct,”** National Academy of Sciences Journal Summit, Washington, DC, March 17, 2016.
- **“DMEPOS Update,”** American Health Lawyers Association, Baltimore, MD, March 2016.
- **“Patient Access to Medications,”** American Association of Clinical Endocrinologists, Boston, MA, Oct. 14, 2016.
- **“Top Ten Issues for Research Universities,”** moderator, National Association of College and University Attorneys Annual Meeting, Chicago, IL, June 2013.

Local and Regional Presentations

- **“Reimbursement Considerations for Clinical Diagnostic Tests,”** Pennsylvania Life Sciences & Association of University Technology Managers, Philadelphia, PA, October 2018.
- **“Research Misconduct and Clinical Trials” and “Research Misconduct and Graduate Students,”** Society for Research Administrators, Minneapolis, MN, April 28 and 29, 2014. • **“Reimbursement with a Global Fair Panel,”** Pennsylvania Bio (BioTech 2010), Philadelphia, PA, October 2010.
- **“Successfully Taking Your Claims Through the Medicare Appeals Process,”** Pennsylvania Bio (BioTech 2010), Philadelphia, PA, October 2010.
- **“Reimbursement for New Medical Technology,”** Carnegie Mellon University, Pittsburgh, PA, April 2010.

SELECTED ARTICLES

- **“Federal Agencies Can Do More To Ensure Correction of the Literature,”** Accountability in Research, Vol. 25, issue 6, Sept. 2018.
- **“The Physician Payment Sunshine Act,”** Ethical Editor, May 2014.
- **“Research Misconduct in Clinical Trials and Clinical Research,”** Ethical Editor, July 2012.
- **“White Paper on Promoting Integrity in Scientific Journal Publications,”** Council of Science Editors, March 2012.

- “**Expressions of Concern and Their Uses**,” by Bridget Noonan and Debra M. Parrish, Learned Publishing, July 2008 Vol. 21, No. 3.
- “**Research Misconduct and Plagiarism**,” by Debra M. Parrish, Journal of College and University Law, January 2007, Vol. 33, No. 1.
- **White Paper on Promoting Integrity in Scientific Journal Publications**,” Council of Science Editors, Editorial Policy Committee (2006).

EXHIBIT C

Parrish Law Offices

788 Washington Road
Pittsburgh, PA 15228

Date
4/2/2018

Invoice

Invoice #
5679

Bill To
Linda Smith

Client/Matter No.	Matter Line 1

Service ...	Description	Qty	Item	Amount
11/17/2017	Follow up with Lambert and Council re L. Smith remanded case	1	Prof Svcs @ \$525/hr	525.00
11/20/2017	Revision of reconsideration for L. Smith	0.25	Prof Svcs @ \$525/hr	131.25
12/19/2017	Postage L. Smith		Postage	6.65
2/8/2018	Linda Smith appeals	1.25	Prof Svcs @ \$525/hr	656.25
3/19/2018	Hearing for Linda Smith with Judge Woodyard	0.75	Prof Svcs @ \$525/hr	393.75
3/29/2018	Telephone conference L. Smith; review of ABN and email for her to send to Medtronic; email response to Linda Ostrow	0.5	Prof Svcs @ \$525/hr	262.50
3/22/2018	Postage L. Smith			26.80
Total				
\$2,002.20				
Balance Due				
\$2,002.20				

Parrish Law Offices

788 Washington Road
Pittsburgh, PA 15228

Date
6/1/2018

Invoice

Invoice #
5740

Bill To
Linda Smith

Client/Matter No.	Matter Line 1

Service ...	Description	Qty	Item	Amount
4/22/2018	postage			21.70
5/15/2018	Linda Smith emails re supplies	0.25	Prof Svcs @ \$525/hr	131.25
			Total	\$152.95
			Balance Due	\$152.95

Parrish Law Offices

788 Washington Road
Pittsburgh, PA 15228

Date

Invoice

Invoice #
5784

Bill To

Linda Smith

Client/Matter No.	Matter Line 1

Service ...	Description	Qty	Item	Amount
6/8/2018	ALJ request and emails re same; telephone conference re mom in Colorado	0.75	Prof svcs @ \$550/hr	412.50
6/18/2018	Emails Linda Smith re appeals	0.33333	Prof svcs @ \$550/hr	183.33
6/28/2018	Requested LS participation in Judge Sardinas hearing (18-01); called OMHA about DOS on NOH and s/w Sonia (x2).	0.16667	Prof Svcs @ \$350/hr	58.33
6/21/2018	postage			6.70

Total \$660.86

Balance Due \$660.86

Parrish Law Offices

788 Washington Road
Pittsburgh, PA 15228

Date

Invoice

Invoice #
5817

Bill To

Linda Smith

Client/Matter No.	Matter Line 1

Parrish Law Offices

788 Washington Road
Pittsburgh, PA 15228

Date

Invoice

Invoice #
5837

Bill To

Linda Smith

Client/Matter No.	Matter Line 1

Service ...	Description	Qty	Item	Amount
8/20/2018	Telephone conference and Emails re extension.	0.25	Prof svcs @ \$550/hr	137.50

Total \$137.50

Balance Due \$137.50

Parrish Law Offices

788 Washington Road
Pittsburgh, PA 15228

Date
12/3/2018

Invoice

Invoice #
5930

Bill To
Linda Smith

Client/Matter No.	Matter Line 1

Service ...	Description	Qty	Item	Amount
11/20/2018	PHB for combined case.	0.5	Prof svcs @ \$550/hr	275.00
11/21/2018	attn to settlement agreement	0.5	Prof svcs @ \$515/hr	257.50
11/23/2018	Postage (Linda Smith)			6.70
			Total	\$539.20
			Balance Due	\$539.20

Parrish Law Offices

788 Washington Road
Pittsburgh, PA 15228

Date
1/2/2019

Invoice

Invoice #
5991

Bill To

Linda Smith

Client/Matter No.	Matter Line 1

Service ...	Description	Qty	Item	Amount
12/11/2018	hearing with ALJ, prep for same, t/c Linda Smith	2.4	Prof svcs @ \$515/hr	1,236.00
12/18/2019	revise/review memo re: CMS1682R and Medtronic devices	3.6	Prof svcs @ \$515/hr	1,854.00

Total \$3,090.00

Balance Due

Parrish Law Offices

788 Washington Road
Pittsburgh, PA 15228

Date

Invoice

Invoice #
6023

Bill To

Linda Smith

Client/Matter No.	Matter Line 1

Service ...	Description	Qty	Item	Amount
2/19/2019	attended hearing with ALJ, t/c Linda Smith re: same, t/c Debbie Parrish re: same	2.2	Prof Svcs @ \$525/hr	1,155.00

Parrish Law Offices
788 Washington Road
Pittsburgh, PA 15228

Date
4/1/2021

Invoice

Invoice #
6668

Bill To
Linda Smith

Client/Matter No.	Matter Line 1
Service ...	Description
3/1/2021	research re complaint
3/12/2021	t/c Phillip Lear re: local counsel, attention to filing complaint
3/20/2021	revise/review memo re: case status, revise/review complaint documents
3/27/2021	revise/review complaint
3/28/2021	revise/review complaint
3/30/2021	revise/review memo re: filing
	Qty
	2.4
	1.2
	2.4
	2.6
	0.6
	1.1
	Item
	Prof svcs @ \$550/hr
	Amount
	1,320.00
	660.00
	1,320.00
	1,430.00
	330.00
	605.00
	Total
	\$5,665.00
	Balance Due
	\$5,665.00

Parrish Law Offices

788 Washington Road
Pittsburgh, PA 15228

Date

Invoice #
6693

Bill To
Linda Smith

Client/Matter No.	Matter Line 1

Service ...	Description	Qty	Item	Amount
4/1/2021	revise/review complaint	0.8	Prof svcs @ \$550/hr	440.00
4/6/2021	revise/review summons	1.1	Prof svcs @ \$550/hr	605.00
4/19/2021	attn to service	0.4	Prof svcs @ \$550/hr	220.00
4/26/2021	attn to service	0.3	Prof svcs @ \$550/hr	165.00

Total

\$1,430.00

Balance Due

\$1,430.00

Parrish Law Offices

788 Washington Road
Pittsburgh, PA 15228

Date

7/1/2021

Invoice

Invoice #

6752

Bill To

Linda Smith

Client/Matter No.**Matter Line 1**

Service ...	Description	Qty	Item	Amount
6/7/2021	reviewing pleadings, t/c Lear re: same, research re: same	1.2	Prof svcs @ \$550/hr	660.00
6/8/2021	revise/review memo re: filing	0.9	Prof svcs @ \$550/hr	495.00
6/15/2021	attn to magistrate consent form	0.9	Prof svcs @ \$550/hr	495.00
6/17/2021	revise/review memo re: production/schedule	0.8	Prof svcs @ \$550/hr	440.00
6/18/2021	revise/review proposed schedule	2.3	Prof svcs @ \$550/hr	1,265.00
6/21/2021	attn to proposed schedule	0.9	Prof svcs @ \$550/hr	495.00
6/22/2021	revise/review memo re: case status/strategy	1.4	Prof svcs @ \$550/hr	770.00
6/24/2021	revise/review response to court order	2.6	Prof svcs @ \$550/hr	1,430.00
6/28/2021	reviewing pleadings, research re: same, revise/review memo re: same, reviewing production, revise/review objection	3.6	Prof svcs @ \$550/hr	1,980.00

Total \$8,030.00

Balance Due \$8,030.00

Parrish Law Offices

788 Washington Road
Pittsburgh, PA 15228

Date
8/2/2021

Invoice

Invoice #
6776

Bill To
Linda Smith

Client/Matter No.	Matter Line 1

Service ...	Description	Qty	Item	Amount
7/12/2021	t/c Linda, revise/review memo re: case status, additional claims	1.2	Prof svcs @ \$550/hr	660.00
7/22/2021	revise/review memo re: case status	0.4	Prof svcs @ \$550/hr	220.00
Total				\$880.00
Balance Due				\$880.00

Parrish Law Offices
 788 Washington Road
 Pittsburgh, PA 15228

Date
9/1/2021

Invoice

Invoice #
6784

Bill To
Linda Smith

Client/Matter No.	Matter Line 1

Service ...	Description	Qty	Item	Amount
8/2/2021	revise/review memo re: additional denials	0.9	Prof svcs @ \$550/hr	495.00
8/9/2021	t/c Phillip Lear - prep for hearing	1.4	Prof svcs @ \$550/hr	770.00
8/10/2021	prep for and attend case management conference	2.7	Prof svcs @ \$550/hr	1,485.00
8/11/2021	attn to appeals, revise/review memo re: same	0.4	Prof svcs @ \$550/hr	220.00
8/25/2021	revise/review motion re: answer	2.7	Prof svcs @ \$550/hr	1,485.00
8/27/2021	revise/review motion re: answer	2.6	Prof svcs @ \$550/hr	1,430.00
8/31/2021	revise/review reply re: answer	2.1	Prof svcs @ \$550/hr	1,155.00
Total				
\$7,040.00				
Balance Due				
\$7,040.00				

Parrish Law Offices
 788 Washington Road
 Pittsburgh, PA 15228

Date
10/1/2021

Invoice

Invoice #
6825

Bill To
Linda Smith

Client/Matter No.	Matter Line 1

Service ...	Description	Qty	Item	Amount
9/1/2021	revise/review reply re: scheduling	2.1	Prof svcs @ \$550/hr	1,155.00
9/2/2021	revise/review reply re: scheduling	3.4	Prof svcs @ \$550/hr	1,870.00
9/5/2021	revise/review MSJ re: CMS 1682-R, revise/review MSJ re: collateral estoppel	3.6	Prof svcs @ \$550/hr	1,980.00
9/6/2021	revise/review MSJ re: CMS 1682-R, revise/review MSJ re: collateral estoppel	6.5	Prof svcs @ \$550/hr	3,575.00
9/7/2021	revise/review MSJ re: CMS 1682-R, revise/review MSJ re: collateral estoppel	11.4	Prof svcs @ \$550/hr	6,270.00
9/10/2021	revise/review Rule 11 motion	2.4	Prof svcs @ \$550/hr	1,320.00
9/13/2021	revise/review Rule 11 motion	2.1	Prof svcs @ \$550/hr	1,155.00
9/14/2021	revise/review Rule 11 motion	2.3	Prof svcs @ \$550/hr	1,265.00
9/21/2021	reviewing opposition to motions for summary judgement, research re: same	1.4	Prof svcs @ \$550/hr	770.00
9/22/2021	revise/review reply re: summary judgements	3.7	Prof svcs @ \$550/hr	2,035.00
9/23/2021	revise/review reply re: summary judgements	4.1	Prof svcs @ \$550/hr	2,255.00
9/24/2021	revise/review reply re: summary judgements	5.2	Prof svcs @ \$550/hr	2,860.00
9/28/2021	reviewing court orders, revise/review memo re: same, t/c Phil Lear re: same	1.1	Prof svcs @ \$550/hr	605.00

Total	\$27,115.00
Balance Due	\$27,115.00

Parrish Law Offices
 788 Washington Road
 Pittsburgh, PA 15228

Date
11/1/2021

Invoice

Invoice #
6844

Bill To
Linda Smith

Client/Matter No.	Matter Line 1

Service ...	Description	Qty	Item	Amount
10/3/2021	revise/review reply re: collateral estoppel/CMS 1682	3.7	Prof svcs @ \$550/hr	2,035.00
10/4/2021	revise/review reply re: collateral estoppel/CMS 1682	6.4	Prof svcs @ \$550/hr	3,520.00
10/4/2021	Revision of papers.	1.5	Prof Svcs @ \$575/hr	862.50
10/5/2021	Edits to filing.	0.75	Prof Srvcs @ \$575/hr	431.25
10/5/2021	revise/review reply re: collateral estoppel/CMS 1682	6.1	Prof svcs @ \$550/hr	3,355.00
10/18/2021	attn to revise/review filing regarding scheduling	3.4	Prof svcs @ \$550/hr	1,870.00
10/26/2021	revise/review opposition to cross - motion re: CMS 1682-R	3.7	Prof svcs @ \$550/hr	2,035.00

Total	\$14,108.75
Balance Due	\$14,108.75

Parrish Law Offices
788 Washington Road
Pittsburgh, PA 15228

Date

Invoice

Bill To

Linda Smith

Client/Matter No.	Matter Line 1

Service ...	Description	Qty	Item	Amount
1/4/2022	revise/review motion for status, t/c opposing counsel	1.5	Prof Svcs @ \$575/hr	862.50
1/5/2022	revise/review motion for status	1.1	Prof Svcs @ \$575/hr	632.50
1/7/2022	revise/review memos re: status conference	0.5	Prof Svcs @ \$575/hr	287.50
1/8/2022	reviewing opp to motion for status conference	0.8	Prof Svcs @ \$575/hr	460.00
1/16/2022	t/c plaintiffs in all cases re: global settlement	1.5	Prof Svcs @ \$575/hr	862.50
1/18/2022	conf with plaintiffs in all cases re: settlement	0.5	Prof Svcs @ \$575/hr	287.50
1/27/2022	t/c Stanley re: motion to alter/amend, revise/review same	6.2	Prof Svcs @ \$575/hr	3,565.00
1/28/2022	revise/review motion to alter/amend	2.4	Prof Svcs @ \$575/hr	1,380.00
1/31/2022	revise/review motion to alter/amend, t/c Stanley re: same	5.4	Prof Svcs @ \$575/hr	3,105.00

Total **\$11,442.50**

Balance Due \$11,442.50

Parrish Law Offices

788 Washington Road
Pittsburgh, PA 15228

Date
3/1/2022

Invoice

Invoice #
6950

Bill To

Linda Smith

Client/Matter No.	Matter Line 1

Service ...	Description	Qty	Item	Amount
2/3/2022	attn to ALJ appeal, revise/review motion to alter/amend	4.6	Prof Svcs @ \$575/hr	2,645.00
2/4/2022	revise/review motion to alter/amend	2.4	Prof Svcs @ \$575/hr	1,380.00
2/8/2022	reviewing denial of motion to alter/amend	1.1	Prof Svcs @ \$575/hr	632.50
2/21/2022	attn to notice of appeal	1.4	Prof Svcs @ \$575/hr	805.00
2/23/2022	attention to appeal filing	0.8	Prof Svcs @ \$575/hr	460.00
2/24/2022	attention to appeal filing	1.1	Prof Svcs @ \$575/hr	632.50
Total				
\$6,555.00				
Balance Due				
\$6,555.00				



The Downey Mansion
 808 East South Temple Street
 Salt Lake City, Utah 84102
 801-538-5000
 Fax: 801-538-5001
 www.learlaw.com
 Tax ID: 87-0687015

Please Pay from this Invoice

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December 21, 2022

Account No: 1490-001

Invoice No: 38843

Linda Pond Smith
 James Pistorino
 Parrish Law Office
 224 Lexington Drive
 Menlo Park CA 94025

v. Xavier Becerra, as Acting Sec. Dept. of Health
 Pro Bono plus Expenses

LEGAL SERVICES RENDERED THROUGH 12/21/2022

			Rate	Hours	
03/26/2021	PWL	Prepare Motion for Admission Pro Hac Vice and proposed order and transmit to J. Pistorino.	480.00	0.80	384.00
04/01/2021	PWL	Revise complaint and transmit to J. Pistorino; upload revised Civil Cover Sheet, Motion Pro Hac Vice, and Complaint; telephone conference with J. Pistorino re complaint.	480.00	2.50	1,200.00
04/02/2021	PWL	Assemble pleadings and transmit Civil Cover Sheet and Complaint to court for case number assignment; telephone conferences with J. Pistorino.	480.00	1.00	480.00
04/05/2021	PWL	Transmit Civil Cover Sheet and Complaint to court clerk for case number assignment; upload and file Civil Cover Sheet, Complaint, and Motion for Admission Pro Hac Vice; telephone conferences with J. Pistorino re same.	480.00	1.50	720.00
04/06/2021	PWL	Prepare summonses for Becerra, M. Garland, and A. Martinez and file same; download court-signed summonses and copy of Complaint and Civil Cover Sheet for service upon same; serve process by certified mail.	480.00	1.40	672.00
04/23/2021	PWL	Track Becerra service of summons and confirm same.	480.00	0.10	48.00
04/26/2021	PWL	Prepare Motion for Admission Pro Hac Vice and proposed order and transmit to J. Pistorino.	480.00	0.80	384.00
08/09/2021	PWL	Zoom conference with J. Pistorini in preparation for tomorrow's court hearing.	480.00	0.90	432.00
08/10/2021	PWL	Zoom court hearing before Judge Pead re motion for order directing filing of Answer and certified admin record.	480.00	0.90	432.00

Linda Pond Smith
 v. Xavier Becerra, as Acting Sec. Dept. of Health

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 December 21, 2022
 Account No: 1490-001
 Invoice No: 35669

			Rate	Hours
08/27/2021	PWL	Prepare Motion to Amend Scheduling Order and file same and proposed order; telephone and email correspondence with J. Pistorino.	480.00	1.20
10/05/2021	PWL	Finalize and file Plaintiff's Reply to Motion for Summary Judgement and to Vacate; finalize and file Plaintiff's Reply to Motion for Summary Judgment on Collateral Estoppel.	480.00	2.20
10/26/2021	PWL	Prepare Plaintiff's Opposition to Cross-Motion and file same.	480.00	0.60
01/31/2022	PWL	Read court rules re requirement, if any, to contact the court prior to seeking a hearing on a motion to amend or alter judgement and report findings to J. Pistorino.	480.00	0.70
02/04/2022	PWL	Read and revise Smith's Motion to Alter and Amend Judgment and return to J. Pistorino with comments.	480.00	0.70
03/04/2022	PWL	Prepare Unopposed Motion to Expedite Appeal and Entry of Appearance and Designation of Interested Persons, transmit to J. Pistorino for comment; transmit Application of Admission to J. Pistorino.	480.00	1.70
03/07/2022	PWL	Telephone conference with J. Pistorino; revise Entry of Appearance and Unopposed Motion to Expedite Appeal and file same; serve opposing counsel via email; forward 10 th Circuit order granting motion to J. Pistorino.	480.00	1.30
03/10/2022	PWL	Prepare Unopposed Motion to Stay Briefing on Attorneys Fees, proposed order, and docketing statement; file motion and order with Utah District Court; file docketing statement with Tenth Circuit; serve documents via email on opposing counsel; telephone conference with Utah District Court re filing.	480.00	1.70
03/11/2022	PWL	Register with Counsel Press for filing paper copies of required filings.	480.00	0.20
03/14/2022	PWL	Prepare opening appellate brief; discuss comments with J. Pistorino; prepare and file Unopposed motion to extend date for filing appeal; transmit order granting same to J. Pistorino.	480.00	1.10
03/15/2022	PWL	Prepare opening appellate brief and discuss comments with J. Pistorino; upload volumes 1 and 2 of appendix to brief; file opening brief and Appendices I and II; forward court's filing confirmation to J. Pistorino.	480.00	1.30
03/18/2022	PWL	File Corrected Appellant's Opening Brief and Appendices Vol. I and II; transmit court filing confirmations to J. Pistorino.	480.00	0.40

Costs may not include everything incurred to 12/21/2022

Linda Pond Smith
 v. Xavier Becerra, as Acting Sec. Dept. of Health

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 Account No: 1490-001
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Total Attorney Services **23.00** **11,040.00**

TOTAL LEGAL SERVICES **23.00** **11,040.00**

TIMEKEEPER SUMMARY

<u>Timekeeper</u>	<u>Hours</u>	<u>Rate</u>	<u>Total</u>
Phillip Wm. Lear	23.00	\$480.00	\$11,040.00

EXPENSES THROUGH 12/21/2022

04/06/2021	Postage	24.15
04/21/2021	Filing Fee – Federal District Court - Complaint	402.00
04/21/2021	Filing Fee – Federal District Court – Pro Hac Vice Admission Fees	250.00
	TOTAL EXPENSES	676.15

TOTAL SERVICES AND COSTS THIS INVOICE **11,716.15**

Costs may not include everything incurred to 12/21/2022

EXHIBIT D

PROCEEDINGS IN OTHER CASES

A timeline summarizing events/cases may assist the Court:

Date	District Court and Other Activity	Activity on Mrs. Smith's claims
April 29, 2016	H.H.S. Civil Remedies Division holds that the Secretary's position does not pass the "reasonableness standard." <i>See</i> DAB No. CR4596 (2016). 2016 WL 2851236	
May 19, 2016	<i>Finigan</i> court calls Secretary's position "head scratching." <i>Finigan v. Burwell</i> , 189 F.Supp.3d 201, 2017, n. 6 (D. Mass).	
October 26, 2017	<i>Whitcomb</i> court calls Secretary's position "unreasonable", "arbitrary and capricious." <i>Whitcomb v. Hargan</i> , Case No. 17-cv-14, Dkt. #19 at 12, 14 (E D. Wisc. Octo. 26, 2017).	
January 29, 2018	<i>Bloom</i> court: "no evidence supports the MAC's conclusion that CGM is not 'primarily and customarily used to serve a medical purpose.'" <i>Bloom v. Azar</i> , 2018 WL 583111 at *10 (D. Vermont, January 29, 2018)	
April 5, 2018	<i>Lewis</i> court: "The Food and Drug Administration, the National Institutes of Health and multiple professional medical societies such as the American Diabetes Association and the American Medical Association deem CGM	

	<p>primarily and customarily to serve a medical purpose as a medical device”, “Council’s decision that CGM devices are not primarily and customarily used to serve a medical purpose constituted legal error and was not supported by substantial evidence.” <i>Lewis v. Azar</i>, 308 F.Supp.3d 574, 578-9 (D. Mass 2018).</p>	
June 12, 2018	<p><i>Whitcomb</i> court: “no reasonable basis for arguing that continuous glucose monitors are not primarily and customarily used to serve a medical purpose; “demonstrates the unreasonableness of the Secretary’s position.” Fees awarded. <i>Whitcomb v. Azar</i>, Case No. 17-cv-14, Dkt. #34 at 4, 6 (E.D. Wisc. June 12, 2018).</p>	
June 15, 2018	<p>By this date, more than 40 ALJs had rejected the Secretary’s position more than 55 times. <i>See</i> https://dparrishlaw.com/parrish-law-offices-wins-significant-victory-for-cgm-users/</p>	
January 16, 2019	<p><i>Bloom</i> court: “no reasonable person would be satisfied by the Secretary’s position that CGMs are not primarily and customarily used to serve a medical purpose.”; fees award (precise amount not decided). <i>Bloom v. Azar</i>, Case No. 16-cv-121, Dkt. #80 at 10 (D. Vermont Jan. 16, 2019).</p>	

March 30, 2019	<i>Lewis</i> court: “breadth of decisions contrary to the Secretary’s position demonstrates a ‘string of losses’”; fees awarded. <i>Lewis v. Azar</i> , 370 F.Supp.3d 267, 273 (D. Mass. 2019)	
April 9, 2019		ALJ Mark Win issues two decisions denying Mrs. Smith’s claims on the grounds that a CGM is not “primarily and customarily used to serve a medical purpose” as dictated by CMS-1682-R. App.322-31.
September 22, 2020	<i>Zieroth</i> court: “the Secretary’s interpretation … is not reasonable” <i>Zieroth v. Azar</i> , 2020 WL 5642614 at *4 (N.D. Cal. Sep. 22, 2020).	
December 3, 2020	<i>Zieroth</i> court: “the Secretary’s position both as set forth in CMS-1682-R and reiterated in the course of the instant litigation, was not reasonable.”; fees awarded. <i>Zieroth v. Azar</i> , 2020 WL 7075629 at *2 (N.D. Cal. Dec. 3, 2020).	
February 23, 2021	<i>Olsen</i> court: “No evidence supports the Appeals Council’s conclusion that a CGM is not ‘primarily and customarily used to serve a medical purpose.’” <i>Olsen v. Cochran</i> , 2021 WL 711469 at *3 (E.D. Wash. Feb. 23, 2021)	

February 26, 2021		MAC issues decision denying Mrs. Smith's claims on the grounds that a CGM is not "primarily and customarily used to serve a medical purpose" as dictated by CMS-1682-R. App.313-21.
April 20, 2021	<i>Olsen</i> court: "Plaintiff seeks market-value attorney fees under Section 2412(b), arguing that Defendant's position in this case was in bad faith. This Court agrees."; "Defendant's defense was 'groundless.'"; "While Defendant's position was not foreclosed by bunding precedent the Court determines that it was 'so obviously wrong as to be frivolous.'"; "Altogether, Defendant's conduct meets the 'high threshold' for an award of and-faith fees." <i>Olsen v. Becerra</i> , 2021 WL 3683360 (E.D. Wash. Apr. 20, 2021).	
October 26, 2021		Noridian denies Mrs. Smith's request for redetermination of the denial of her claim for coverage of CGM supplies provided on July 14, 2021, based on CMS-1682-R and its contention that a CGM is not "primarily and customarily used to

		serve a medical purpose.” App.287.
December 17, 2021		The Qualified Independent Contractor (QIC) denied Mrs. Smith’s request for reconsideration on the grounds that CMS-1682 barred coverage because a CGM is not “primarily and customarily used to serve a medical purpose”, as dictated by CMS-1682-R. App.286-91.

With regard to the Olsen’ Court’s “bad faith” finding, Mrs. Smith’s research indicates that this is only the eleventh “bad faith” finding against the government in more than a decade out of more than two million cases.